Montana Law Review

Volume 27
Issue 1 *Fall 1965*

Article 3

July 1965

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The Pelton Decision: A Symbol — A Guaranty That the Development and Conservation of Our Nation's Resources Will Keep Pace With Our National Demands

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This consideration is directed to the *Pelton* decision,[1] and the historic precedents it reaffirmed. Included are references to some of the attacks which have been made against the principles set forth in *Pelton*. Existing unrestrained federal programs demonstrate the indispensable nature of the precepts express and inherent in the *Pelton* decision. For example:

1. As owner of the lands which the sources of the major streams of Western United States, the national government must take the lead in the conservation of the *Winters Doctrine Rights* to the use of the waters of those streams and must resist every effort to make them available for private acquisition.[2]
2. The United States must continue the struggle against the ever-growing land and water monopolies which stultify the economies where they are found.
3. The national government must proceed with present plans and formulate new ones for basin development to meet the demands of an expanding economy that to a marked degree is dependent upon the use of our water resources.

Long-range plans now being effectuated will enable this country to sensibly utilize and to conserve its water resources in accord with the needs of a rapidly expanding population. Widely disparate, but basically interdependent activities embracing large segments of Western United States are involved. The success of those plans requires that the federal government have the power to implement them, as well as to lead state and local authorities in the proper development of water resources. Therein lies the importance of the *Pelton* decision and the concepts which it so clearly enunciates.

BACKGROUND AND ANALYSIS OF PELTON

From the background of the *Pelton* decision come the objectives sought

*L.L.B., University of Montana School of Law, 1934. While Special Assistant to the Attorney General, Mr. Veeder either personally tried or participated in the controversial cases referred to in this article, including that giving rise to the *Pelton* decision, in which there was espoused the demand for the freedom of the federal government in the development, use and administration of the nation's water resources.

The views expressed herein are those of the writer and do not necessarily reflect those of the Department of Justice or any other agency or department of the federal government.

[1]FPC v. Oregon, 349 U.S. 435 (1955). (Hereafter referred to as the *Pelton* decision.)

when the matter was taken to the Supreme Court. In this connection, the express language and the general tenor of the opinion of the court of appeals is important.[3] If this opinion had not been reversed, it would have constituted a devastating blow to the programs of the national government in the entire field of natural resources.

The primary question in *Pelton* was: whether a private power company, which had received a federal license to build the Pelton Dam across the Deschutes River upon reserved lands of the United States, was also required to secure approval from Oregon as a condition to constructing the project. When the Federal Power Commission rejected the state's contention, Oregon petitioned the court of appeals to reverse the Commission, which it did, declaring: "[It is] our opinion that the Commission has trenched upon the sovereignty of the state of Oregon. . . .The fundamental principle. . . .is that Oregon has the right to regulate its own waters in its chosen way."

The crux of the *Pelton* decision of the court of appeals was stated in this sentence: "We proceed to the question of the sovereign power over the waters of the Deschutes River."[4] In analyzing the question, Judge Stephens reviewed in detail the inherent weaknesses of the riparian doctrine respecting rights to the use of water in the arid and semiarid west.[5] He concluded that to overcome those weaknesses, "Congress provided the remedy by separating the title to the [public] land from the right to the control of the water and allowed the states, within which such waters flowed, to regulate them. Acts of Congress of 1866, 1870, and the Desert Land Act of 1877."[6] That conclusion was drawn largely from the *California Oregon Power Company* decision.[7]

[2]See Veeder, *Winters Doctrine Rights*, 26 MONT. L. REV. 149 (1965): A basic principle of the *Winters Doctrine* is "that although not mentioned in the treaties, executive orders or other means used to establish the reservations, there is an implied reservation of rights to the use of the waters in streams which rise upon, traverse or border upon Indian reservations, which may be exercised in connection with the Indian lands. Those rights to the use of water are withheld from appropriation by others subsequent to their reservation."

It is important to bear in mind the meaning of the following terms: 1. "Public domain" is the term used in regard to all of the lands of the United States, including both "public lands" and "reserved lands." 2. "Public lands" have been defined as being "unqualifiedly subject to sale and disposition" (*Pelton*, 349 U.S. 435, 449). 3. "Reserved lands" have been referred to as follows: "It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose." U.S. v. O'Donnell, 303 U.S. 501, 510 (1938).

[3]Oregon v. FPC, 211 F.2d 347 (9th Cir. 1954).

[4]*Id.* at 352, 354.

[5]Riparian rights attach only to lands (1) which are contiguous to or abut upon the stream, (2) only to the smallest tract held under one chain of title, (3) within the watershed of the stream. [Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 81 P.2d 533 (1938).)]

[6]*Supra* note 3, at 353; 19 Stat. 377 (1877), as amended, 43 U.S.C. § 321 (1965). That act having authorized entry upon desert lands of the United States of America, requiring a declaration under oath that the entryman "intends to reclaim a tract of desert land" provided:

> That the right to the use of water. . .shall depend upon bona fide prior appropriation; . . .and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

[7]Judge Stephens analyzed 227 in this case as follows:

The court of appeals in the *Pelton* case proceeded on the basis that the rights of the national government, in the field of water resources, had been subverted to the control of the states. All doubt as to the correctness of that conclusion is removed by this additional statement:

> [T]he cession [by the Act of 1877] was a surrender of all regulatory power over such waters and was not limited to their use in irrigation. Whatever, if any, limitation there was on Oregon's complete sovereignty over the waters of the Deschutes River, was wiped out by the Desert Land Act of 1877.

The court of appeals then concluded: "the Commission. . .has exceeded its legal jurisdiction in that the ownership of the power dam site does not empower the United States government to use the waters of the Deschutes River either at the site of the power dam or elsewhere, contrary to Oregon state law. . . ."[8]

Judge Healy's strong dissent lent great strength to the petition for a writ of certiorari. In sharply criticising the majority for its interpretation of the Acts of 1866, 1870, and the Desert Land Act of 1877, he said:

> In my opinion the reliance is wholly misplaced. As is apparent from their wording, these statutes have reference only to stream and other bodies of water on the *public lands*, that is, lands subject to entry or mode of acquisition under the public land laws. They have no application to waters on reserved lands.[9]

It is impossible to imagine a factual statement which would bring the *Pelton Dam* case more clearly within the purview of the *Winters Doctrine*.[10] Yet the majority of the court of appeals sought to avoid the impact of that decision by this most unusual footnote: "We here treat the

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> As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. Howell v. Johnson, C.C., 89 Fed. 556, 558. The fair construction of [the Desert Land Act of 1877] is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. . . .What we hold is that following the Act of 1877, if not before, all non navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states. . . .

211 F.2d 347, 353; California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64 (1935). (Hereafter referred to as the *California Oregon Power Company* decision.)

[8]*Supra* note 3, at 354.

[9]*Id.* at 355.

[10]In connection with Judge Healy's dissent, reference is made to the fact that on June 25, 1855, a treaty was entered into between the United States and the Confederated Tribes of Indians in middle Oregon. (12 Stat. 963). Retained by the Indians in their treaty was an area the description of which commences "in the middle of the channel of the De Chutes River." That clause brings the *Pelton* case squarely within the principles of Winters v. United States, 207 U.S. 564 (1908). Moreover by related provisions of the treaty the eastern boundary of the reservation was established as "the middle of the channel of said [De Chutes] river." (12 Stat. 964). This statement paraphrasing United States v. Winans, 198 U.S. 371, 381 (1905), emphasizes the fact, "When considering the nature of the grant under consideration, we must not forget that it was not a grant to the Indians, but was one from them to the United States, and all rights not specifically granted were reserved to them." United States v. Hibner, 27 F.2d 909, 911 (E.D. Idaho 1928). Consonant with the principles that by the treaty the Indians retained title to that which they did not cede is this provision of the treaty in question: "the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians." (12 Stat. 964). Respecting the treaty, Oregon's highest court has declared it to be "binding upon Oregon" as the law of the land. Anthony v. Veatch, 189 Ore. 462, 220 P.2d 493, 502-03, 221 P.2d 575 (1950).

Indian lands as United States lands since, in the absence of treaty or special Act of Congress to the contrary, the fee title to Indian lands is in the United States, subject to their use and occupancy by the Indians."[11]

Having stated the general principle of constitutional law that a state may not exercise a "veto" power[12] over the will of Congress, the Supreme Court in the *Pelton* decision reversed the opinion of the court of appeals in these terms: "the Acts of July 26, 1866, July 9, 1870, and the Desert Land Act of 1877[13]. . .are not applicable to the reserved lands and waters here involved."[14] The Court then proceeded to distinguish between the Indian lands and withdrawn lands, upon which the *Pelton* project was to be located, and "public lands" to which the Desert Land Act of 1877 is applicable, by stating that the former "are not unqualifiedly subject to sale and disposition. . . ."[15]

Despite adverse comment in some legal periodicals,[16] the *Pelton* decision is now a deeply rooted precedent. It is accepted along with *Winters* as part of the fundamental law upon which national programs of water conservation and utilization are formulated.[17]

CALIFORNIA OREGON POWER COMPANY DECISION DOES NOT CONFLICT WITH THE PELTON CASE

A focal point of attack on *Pelton* is that in some manner it conflicts with the *California Oregon Power Company* decision.[18] The rationale of this attack upon *Pelton* was stated by Oregon in its briefs to the Supreme Court which relied upon the *California Oregon Power Company* and the later Supreme Court case *Ickes v. Fox*.[19] *Ickes v. Fox* simply reiterated the precepts enunciated by the earlier decision[20] and the general principles of the *Colorado Doctrine*, subsequently to be reviewed.

Oregon argued in these terms:

[11] *Supra* note 3, at 351 n. 9.

[12] *Supra* note 1, at 445.

[13] *Supra* note 6.

[14] *Supra* note 1, at 447-49.

[15] *Id.* at 448.

[16] Note, *Federal Water Rights Legislation and the Reserved Lands Controversy*, 53 GEO. L.J. 750, 752 (1965). (Hereafter referred to as *Federal Water Rights Legislation.*)

[17] RIFKIND, REPORT OF THE SPECIAL MASTER, *Arizona v. California*, 293 (1961).

[18] See *Federal Water Rights Legislation, supra* note 16; Munro, *The Pelton Decision: A New Riparianism*, 36 ORE. L. REV. 221, 240, 243 (1957).

[19] 300 U.S. 82, 95 (1937). Whatever significance *Ickes v. Fox* has today is of no importance here except that it is frequently seized upon by those who attack *Pelton* as a basis for their conclusions. To cast the case of *Ickes v. Fox* in its proper perspective it should be considered in the light of Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 702 n. 26 (1949). Involved in *Ickes* was the question of whether the United States needed to be joined as an indispensable party to a proceeding involving an alleged invasion by the Secretary of the Interior of rights which had been acquired pursuant to state law and had been long exercised. Having vested, those rights were entitled to the same protection as other property interests. In the decree concluding major conflicts upon the Yakima River the vested rights were fully recognized. More important, however, is the fact that the best right on the river was awarded to the Yakima Indians, thus taking cognizance of the basic and fundamental precepts that a *Winters Doctrine Right* will take precedence over the rights allegedly invaded in the case of *Ickes v. Fox.*

[20] Brief for Respondents, p. 22, *et seq.*, *FPC v. Oregon, supra* note 1.

> The only true ownership in water is one of a right to use. Neither the United States nor any individual state can possess a true title unless and until a beneficial use of water is made. . . .
> The effect of the dedication of the waters of state to the state or to the people confers no ownership of title in the running waters flowing within such respective jurisdiction. . . .

Concluding the "water" phase of its argument, Oregon said this:

> A Constitutional and statutory provision dedicating *water* to the public should be construed as meaning the same as the phrase *publici juris*, that the water is a wandering things whose corpus is incapable of ownership either by the state or the United States, the utmost right being usufructuary and subject to acquisition by any member of the public first applying in conformity with state regulations.[21]

Oregon's argument is supported by this frequently quoted excerpt from the *California Oregon Power Company* decision, which represents the crux of the argument against the *Pelton* decision: "What we hold is that following the [Desert Land] Act of 1877, if not before, all nonnavigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states. . . ."[22] That quoted excerpt is a reiteration of the sophistry upon which the *Colorado Doctrine* is predicated.

As Owner of the "Public Domain" the United States Could Dispose of the Unappropriated Rights to the Use of Water With the Land or Sever Them From the Land for Purposes of Disposition

Fundamentally the federal-state conflict in the field of western water resources, which is exemplified by the controversy over *Pelton*, is political in character. It is the natural offspring of our system of dual sovereigns. Resolution of that struggle may not be possible. Nevertheless, the establishment of the source of title and of the ownership of private rights to the use of water is crucial if a sensible colloquy in the conflict is to be conducted.

All doubt is removed that the national government is the source of the title to private rights to the use of water in the desert land states[23] by this express ruling in the *California Oregon Power Company* decision: "As he owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. Howell v. Johnson [D. Mont. 1898], 89 F. 556, 558."[24]

The case of *Howell v. Johnson* is significant because the court there expressly considered the source of the rights to the use of water appropriated on public lands in Wyoming. From the above cited page this excerpt is taken:

> The rights of plaintiff do not, therefore, rest upon the laws of Wyoming, but upon the laws of congress. . . .

[21] *Ibid.*
[22] *Supra* note 7.
[23] 19 Stat. 377 (1877), 43 U.S.C. § 323 (1965)—California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, North Dakota and South Dakota.
[24] *Supra* note 7, at 162.

> The national government is the proprietor and owner of all the land in Wyoming and Montana which it has not sold or granted to some one competent to take and hold the same. . . .The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper.
>
> The federal government is not restrained in the disposal of its lands by state law. . . .*The state governments cannot restrict it in the primary disposal of its lands.*[25] (Emphasis supplied.)

Montana's Supreme Court adheres to the same principle as that enunciated in *Howell v. Johnson:*

> A water right can therefore be acquired only by the grant, express or implied, of the owner of the land and water. The right acquired by appropriation and user of the water on the public domain is founded in grant from the United States government as owner of the land and water. Such grant has been made by Congress.[26]

Washington,[27] Idaho,[28] and California[29] have all adopted the concept that the United States is the source of the title to rights to the use of water.

In view of Oregon's position in the *Pelton* case it is of interest that the supreme court of that state has consistently held that an appropriation of rights to the use of water was a grant of rights from the "general government."[30] The measure of Oregon's dilemma in *Pelton* is delineated by Justice Sutherland's statement in the *California Oregon Power Company* decision, alluding to the Oregon Supreme Court case of *Hough v. Porter* as "well reasoned."[31] From that decision, these excerpts are taken:

> This unquestioned power of the owner [the United States] over the public domain was exercised and any one entering upon, and acquiring title to, any part of the public domain after the passage of this act accepted such land and title thereto with full knowledge of the law under which the patent was issued; the import thereof being that *this right incident to the soil* was reserved by the government. . . .[32] (Emphasis supplied.)

[25]Howell v. Johnson, 89 Fed. 556, 558-59 (D. Mont. 1898).

[26]Smith v. Denniff, 24 Mont. 20, 21, 60 Pac. 398 (1900). See also Story v. Woolverton, 31 Mont. 346, 353-54, 78 Pac. 589, 590 (1904).

[27]Benton v. Johncox, 17 Wash. 277, 289, 49 Pac. 495, 499 (1897). "The government, being the sole proprietor, had the right to permit the water to be taken and diverted from its riparian lands; . . . ."

[28]Le Quime v. Chambers, 15 Idaho 405, 98 Pac. 415 (1908).

[29]Lux v. Haggin, 69 Cal. 255, 338, 10 Pac. 674, 721 (1886):

> It has never been held that the right to appropriate waters on the public lands of the United States was derived directly from the state of California as the owner of innavigable streams and their beds; and, since the act of congress granting or recognizing a property in the waters actually diverted and usefully applied on the public lands of the United States, *such rights have always been claimed to be deraigned by private persons under the act of congress, from the recognition accorded by the act, or from the acquiescence of the general government in previous appropriations made with its presumed sanction and approval.* (Emphasis supplied.)

[30]Morgan v. Shaw, 47 Ore. 333, 337, 83 Pac. 534, 535 (1906).

[31]*Supra* note 7, at 160-61.

[32]51 Ore. 318, 391, 95 Pac. 732, 98 Pac. 1083, 1092 (1908, 1909); 2 KINNEY, IRRIGATION AND WATER RIGHTS, 1118 (2d ed. 1912), reiterates that proposition. From this latter source, at 692-93, this statement is taken:

> The Government is still the owner of the surplus of the waters flowing upon the public domain. . . .It therefore follows, as the result of the ownership by the United States of the waters flowing upon the public domain, that any dedication by a State of all the waters flowing within its boundaries to the State or to the public amounts to but little, in the fact of any claim which may be made by the Government, *at least* to all the surplus or unused waters within such State.

This conclusion must be drawn from the preceding review of the authorities upon the subject: both the Supreme Court of the United States and the supreme court of the state which brought about the ruling in *Pelton,* recognize that the source of title to privately acquired rights to the use of water in the desert land states is the national government.[33]

Nothing in the Desert Land Act of 1877, or the Acts from Which It Evolved, Would Support a Conclusion Different from That Expressed in Pelton

From the express language of the *California Oregon Power Company* decision and the numerous state court decisions which have been cited, it is evident that the national government had vested title to all of the rights to the use of water in the streams on the "public lands." The correctness of the *Pelton* decision turns upon whether the Acts of 1866, 1870, and the Desert Land Act of 1877, resulted in a divestiture of that title.[34] Specific principles of construction must be followed in the interpretation of congressional enactments disposing of properties of the federal government.[35] The exclusive and unlimited power of the Congress over these properties under the provisions of Article IV, Section 3, Clause 2 of the Constitution is clear.[36] In addition, the Supreme Court has held that: "The Government, . . .holds its interests here as elsewhere in trust for all the people, . . .and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."[37]

Nothing in the legislative history of the Acts of 1866 and 1870 lends support to the concept that the United States has granted away its ownership or the rights to the use of water in the streams rising upon or traversing the public lands. Respecting those Acts, the Supreme Court has stated that they gave "the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon

[33]Omitted are references to the states purportedly adhering to the *Colorado Doctrine.* That doctrine is subject to special reference in a subsequent portion of this consideration.

[34]Act of July 26, 1866, § 9, 14 Stat. 251, 253, and the Act of July 9, 1870, § 16, 16 Stat. 218, 43 U.S.C. § 661 (1965), provide as follows:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; . . . . All patents granted, or preemption or homesteads allowed shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section.

The Desert Land Act of 1877, *supra* note 6, having authorized entry upon desert lands of the United States, required a declaration under oath that the entryman "intends to reclaim a tract of desert land."

[35]United States v. Utah Power & Light Co., 209 Fed. 554 (8th Cir. 1913); *affirmed* 243 U.S. 389 (1917).

[36]United States v. San Francisco, 310 U.S. 16 (1940); United States v. California, 332 U.S. 19 (1947).

[37]*United States v. California, supra* note 36, at 40. See also, Camfield v. United States, 167 U.S. 518 (1897).

the local customs, laws, and decisions of the courts. . . ."[38] The Acts of 1866 and 1877 constitute "no grant of specific rights by the Congress of the United States."[39]

Nor is there anything in the Act of 1877 which would support a conclusion that the national government had stripped itself of title to the most valuable asset found upon the arid and semiarid public domain—rights to the use of water.[40] The Act contains no word of grant or dedication. The mere reservation of rights to the use of unappropriated waters on the "public lands" for the use of the public under the laws of the states and territories named, cannot be construed as a divestiture of title. Efforts to expand the limited terminology of the Act of 1877 to include all of the "public domain," as distinguished from "public land" open to private acquisition, does violence to the well settled principles that "statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee."[41]

California Oregon Power Company Decision Could Not Decide Issues Relating to United States Which Were Not Before the Court

Those who decry *Pelton* as violating principles of the *California Oregon Power Company* decision ignore the facts of the latter case. There the litigation was between two private claimants to rights for the use of water in the Rogue River, a nonnavigable stream. One contestant, a power company, asserted that a riparian right passed to its predecessor in interest by a homestead patent issued in 1885, eight years after the Act of 1877. Challenging that claimed right was a cement company, which asserted that its rights were based upon permits issued by Oregon's state engineer. Thus, only claimed private rights were involved. Any doubt as to the limited scope of the issues is removed by this inquiry presented by the Supreme Court and the response which it made to the question: "The question with which we are here primarily concerned is whether . . .the homestead patent in question [issued under the Homestead Act of 1862, 13 Stat. 35, to the predecessor of the Power Company] carried with it as part of the granted estate the common-law rights which attach to riparian proprietorship."[42]

Having commented upon the broad language of the Desert Land Act respecting "surplus water" on the *"public lands,"* the Court made this pro-

[38]Jennison v. Kirk, 98 U.S. 453, 456-57, 459 (1878).

[39]*United States v. Utah Power & Light Co., supra* note 35, at 560. A direct parallel with the Acts of 1866 and 1870 is found in the mining laws applicable to the public domain. State and local mining laws were adopted by Congress to prescribe the method of acquisition of minerals on the properties of the national government. Butte City Water Co. v. Baker, 196 U.S. 119 (1904). Nevertheless, the Supreme Court held that the United States retained title to the minerals not privately acquired under the mining law statutes and could exercise its constitutional control over their disposition. A similar conclusion is unavoidable in regard to the rights to the use of water which are part and parcel of the "public domain."

[40]See note 7 *supra.*

[41]Note 35 *supra.*

[42]*Supra* note 7, at 153-54.

nouncement: "It follows that a patent issued thereafter [after the Desert Land Act] for lands in a desert-land or territory, under *any of the land laws* of the United States, carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed."[43] Simply stated, the Court recognized that when Congress authorized acquisition, separate from the land, of appropriative titles to the rights for the use of water, it necessarily denied to subsequent grantees of the public land "the common-law right to have the stream continue to flow in its accustomed channel, without substantial diminution."[44] The Supreme Court was not called upon to reach the basis of the opinion of the court of appeals, which declared that the states had authority to modify riparian rights for the general welfare through the exercise of their police power.[45] As a consequence the issues in the *California Oregon Power Company* decision did not give rise to many of the principles ascribed to it.

The principles set forth in the *California Oregon Power Company* decision cannot be applied to the rights of the United States to the use of water which is part of its "reserved lands," or to the *Winters Doctrine Rights* of the Indians. To "try" the title of the national government to those rights would require that the United States be a party to the action, and it was not.[46] In the *Ahtanum* case the Court of Appeals for the Ninth Circuit specifically ruled that the rights to the use of water of the United States could not be decreed in a proceeding to which it was not a party.[47] The *California Oregon Power Company* decision did not relate to the claimed rights of the United States to the unapproved waters, for a determination of title to those rights "raises questions of law and fact upon which the United States would have to be heard."[48] The declaration by the Supreme Court in this case that all nonnavigable waters on the public domain became "*publici juris*" is thus *obiter dictum*.

The issues presented in the *Pelton* decision were broader than those raised in the *California Oregon Power Company* case. In the latter decision, questions concerning the rights, interests, power and authority of the United States were directly, and unavoidably presented for resolution. Not only did Oregon, in the *Pelton* case, claim title to the rights to the use of water in the Deschutes River—thus placing at issue title of the national government to rights held in trust for the Indians and the nation as a whole—it asserted a veto power over the will of Congress as expressed in

[43] *Id.* at 158.

[44] *Id.* at 153. Justice Sutherland who spoke for the Court in the *California Oregon Power Company* decision, had a formidable task to rationalize the provisions of the Desert Land Act as being applicable to the Homestead Act of 1862 pursuant to which the predecessor of the Power Company patented the lands involved. See Argument for Petitioner, *id.* at 142.

[45] *Ibid.* California did precisely that through its Constitutional amend. XIV, § 3.

[46] Minnesota v. United States, 305 U.S. 382, 386 (1939).

[47] United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 328 (9th Cir. 1956); Appellees' *cert. denied* 352 U.S. 988 (1957).

[48] Louisiana v. Garfield, 211 U.S. 70, 77 (1908). See also New Mexico v. Lane, 243 U.S. 52 (1917).

the Federal Power Commission Act.[49] In the opening phase of its "Argument" these statements were made:

> [S]aid Desert Land Acts had the effect to sever all waters from the public domain from the land itself; that the rights, title and interest in and to all waters of the State, and the right to regulate its use are vested in the State; that the State of Oregon has refused to license the proposed [Pelton] project; that under Section 9 b of the Federal Power Act (16 U.S.C.A. 802 b), the refusal of the State to approve the project is an absolute bar to the licensing of the project by the Federal Power Commission."[50]

At issue in *Pelton* was the power of a quasi-sovereign to prevent a sovereign of delegated powers, acting under the Supremacy Clause of the Constitution,[51] from administering its properties in accordance with the Property Clause of the Constitution.[52]

Pelton Decisions Coalescence of the Severed Titles to Land and Rights to the Use of Water on Withdrawn Lands

A proper assessment of the *Pelton* decision must be made in the light of the legal effect of the Desert Land Act of 1877. This Act was construed by the *California Oregon Power Company* decision as severing, for the purposes of private acquisition, the title to the "public lands" from the title to the unappropriated rights to the use of water; and thus creating two separate estates to be acquired independently of each other.

These two estates are freehold estates in real property.[53] This proposition has been accepted in Oregon.[54] The Supreme Court has also recognized that a head of water in a stream is a property right which, owned by the United States, may be leased to private concerns;[55] and that "*water power, the right to convert it into electric energy, and the electric energy thus produced, constitute property belonging to the United States. . . .* Authority to dispose of property constitutionally acquired by the United States is expressly granted to Congress by Section 3 of Article IV of the Constitution."[56] (Emphasis supplied.)

By licensing the Pelton Project, the United States not only granted a direct flow right to the use of water for the generation of electricity, but also granted the right to store water for the purpose of increasing the head. Thus, there is no basis for the statement that "Pelton, an anom-

[49]First Iowa Hydroelectric Cooperative v. FPC, 328 U.S. 152 (1946).

[50]Brief for Respondents, p. 14, *FPC v. Oregon, supra* note 1.

[51]U.S. CONST. art. VI, (Supremacy Clause): "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . . ."

[52]U.S. CONST. art. IV, § 3, Clause 2 (Property clause): "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . . ." See also, *FPC v. Oregon, supra* note 1, at 445.

[53]1 WIEL, WATER RIGHTS IN THE WESTERN STATES 298-301 (3rd ed. 1911).

[54]OR. REV. STAT. secs. 111.010, 540.510-540.530 (1963). See also *supra* note 32.

[55]United States v. Chandler-Dunbar Co., 220 U.S. 53, 73 (1913).

[56]Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 330 (1936). See also *United States v. San Francisco, supra* note 36.

aly to water rights law since no water rights were involved in the litigation, brought to the fore the 'reservation' theory. . . ."[57] The Supreme Court recognized that the objective of the Pelton Project was to exercise the direct flow and storage rights in the Deschutes River.[58]

In substance the Supreme Court ruled that a coalescence took place of the title to the rights to the unappropriated water in the nonnavigable streams and the title to the soil comprising the "public lands" into a single estate, which had been severed into two estates by the Desert Land Act of 1877 when those public lands were withdrawn from the status of being unqualifiedly subject to sale and disposition because they have been appropriated (by the United States) to some other purpose.[59] That merger into a single estate, including both title to the land and title to the unappropriated rights to the use of water is of immense importance to the nation. The legal consequence of this declaration is that those rights to the use of water are no longer subject to private acquisition. This guarantees that the purpose for which lands are withdrawn may not be defeated by reason of subsequent private acquisition of rights to the use of water required in connection with national parks, forests, and grazing districts.

EFFECT OF PELTON ON THE COLORADO DOCTRINE[60]

Overtones of the *Colorado Doctrine* pervade the opinion of the court of appeals which *Pelton* reversed.[61] Throughout the opinion references are made to "water" as distinguished from rights to their use. Judge Stephens who wrote the opinion, an expert in the field of western water law, was well aware of the difference. Yet, he alludes to the alleged right of Oregon "to regulate its own waters in its own chosen way."[62] Oregon, in its presentation to the Supreme Court, set forth the very essence of the *Colorado Doctrine*:

> A constitutional and statutory provision dedicating water to the public should be construed as meaning the same as the phrase publici juris, that the water is a wandering thing whose corpus is incapable of ownership either by the state or the United States, the utmost

[57] *Federal Water Rights Legislation, supra* note 16, at 753.

[58] *FPC v. Oregon, supra* note 1, at 448.

[59] *Ibid.*

[60] The *Colorado Doctrine* is evolved from a consideration of the nature of water. "By natural law these things are common to all: the air, running water, the sea. . . . They are *not* property. . . .the law regulates the use of it, but the rights of flow and use are what the law recognizes, and not property in the water itself. *The water itself is 'common' or publici juris.*" (Emphasis supplied.) Wiel, *Theories of Water Law*, 27 HARV. L. REV. 530 (1914).

Thus the *Colorado Doctrine* holds that all waters of natural streams are held in common by the public or the state; the common law riparian doctrine is rejected; the United States has no greater interest in water upon its lands than a private landowner; the state controls the waters flowing in the streams and can prescribe the method of acquiring rights in it through appropriation, and no one, including the United States, may acquire a right to use water other than from the state. 1 WIEL, *op. cit. supra* note 53, at 186 *et seq.*

[61] *Oregon v. FPC, supra* note 3, at 353.

[62] *Id.* at 354.

> right being usufructuary and subject to acquisition by any member of the public first applying in conformity with state regulations. . . .
> These principles are in strict conformity with the 1935 decision of the United States Supreme Court in *California-Oregon Power Company*. . . .[63]

Oregon, by that contention, placed squarely in issue the validity of the *Colorado Doctrine* as stated in the *obiter dictum* of the *California Oregon Power Company* decision: "What we hold is that following the Act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states. . . ."[64]

With the development of the conflict between the monopolies and the conservation interests during the first quarter of this century, appeared ardent advocates of the *Colorado Doctrine*. One of the most competent and respected of those adherents, the late L. Ward Bannister of Denver, Colorado, urged: "The Colorado-doctrine states disclaim the riparian system altogether and, accordingly, put forward no theory to support it. *They assert state sovereignty over the waters and then proceed by virtue thereof to declare them subject to disposition by the state under the priority system.*"[65]

Mr. Bannister rejected the assertions that upon admission to the Union, title to the unappropriated rights to the use of water passed from the national government to the states by reason of state constitutional provisions: "If this be the only theory of supporting a power in the state to dispose of the waters, only some of the states would have the power, for only some have constitutional character."[66]

Those who espouse state control and ownership of all rights to the use of water deny that title to rights to the use of water passed to the United States when the cessions of the lands constituting the "public domain" were made by France, Spain, Mexico, Great Britain, and the Indians. The *Colorado Doctrine* is based on the theory that no one owns the *corpus* of the *water*—that it is *publici juris*.

Another argument for the *Colorado Doctrine* is based on an analogy to the law respecting wild game. It has been said that "running water itself is not subject to ownership at all;" but is rather "classed with other natural media . . . air, light, and wild game."[67] To support the concept that title to the water resided in Colorado, Mr. Bannister referred to *Geer* v. *Connecticut*,[68] which involved the control of, rather than the *title* to game

[63]Brief for Respondents, p. 24, *FPC v. Oregon, supra* note 1.

[64]*Supra* note 7, at 163-64, 160-62.

[65]Bannister, *The Question of Federal Disposition of State Waters in Priority States*, 28 HARV. L. REV. 270, 279 (1915).

[66]*Id.* at 283, 287-88. Citing the Colorado Constitution, (COLO. CONST. art. XVI, § 5) Mr. Bannister continued:

> Some of the Colorado-doctrine commonwealths, bent on putting the waters as far as possible beyond the control of the federal government, have adopted constitutional provisions declaring the waters to be the 'property of the public' or the 'property of the state.' Even these provisions which are substantially the same in effect are not considered as vesting the state with any property right in the waters or in their use but affirming sovereign jurisdiction over them.

[67]*Id.* at 286.

[68]161 U.S. 519, 527, 528 (1895).

birds. He concluded that: "The succession of the state in respect to the running water was to power, not to property, for the latter the United States had none."[69]

Judge Pope of the Ninth Circuit Court of Appeals summarized the principles upon which the *Colorado Doctrine* is predicated in these terms:

> [S]uch enactments [claiming state ownership of water] have always been held to be mere general declarations that the waters within the State shall be available for acquisition by the people in accordance with local laws. Such a statutory declaration has no more force or effect as basis for the establishment of property rights than the somewhat similar statutory declaration that wild animals and birds are the property of the people of the State.[70]

Wiel's conclusions similarly express the basis and fallacies of the doctrine:

> Under the Colorado doctrine, then, it is denied that the United States has an interest in the waters on its lands as proprietor, and waters are either owned by the State in trust for the people, or are *"publici juris"* owned by *no one* at all, but free for use by all under State police power regulation, which protects the first comer, the prior appropriator, to the extent of his beneficial use.[71]

The most unfortunate aspect of the *Colorado Doctrine* is that it was conceived in the error that the national government should be—indeed, that it could be—precluded from conducting programs of river development. Because it is based upon a fiction rather than on sound principles of law, it has led to conflicts which should never have occurred. Many leaders who honestly believe that the national government has expanded into fields beyond the scope of the Constitution, are influenced by special interest groups. These groups would benefit immensely through land and water monopolies, if the national government could be restricted from developing its lands and unappropriated rights to the use of water.[72]

No one denies that the state police power may be invoked by state statutes relating to the acquisition and adjudication of private rights to the use of water. For example, Utah statute provides that: "All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use

[69]Bannister, *supra* note 65, at 292. In Missouri v. Holland, 252 U.S. 416, 434 (1920), Justice Holmes rejected the concept of state title to wild birds in these terms:

> The State as we have intimated found its claim to *exclusive authority* [as is asserted in regard to water in the *Colorado Doctrine*] *upon an assertion of title to migratory birds*, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, ... *To put the claim of the State upon title is to lean upon a slender reed.* Wild birds are not in the possession of anyone; and possession is the beginning of ownership. (Emphasis supplied.)

[70]California v. United States, 180 F.2d 596, 608, 609 (1950) (Pope, J., dissenting). This case demonstrates California's dilemma between its court's recognition of the national government as the source of title to rights to the use of water, and its political desire to seize control of all water within its jurisdiction.

[71]WIEL, *op. cit. supra* note 53, at 199.

[72]See dissent, *In re* Bear River Drainage Area, 2 Utah 2d. 208, 271 P.2d 846 (1954), which clearly demonstrates the motives of those who would monopolize water on "reserved lands." For example, the large livestock owner who grazes his stock in common on the national forest would be a prime beneficiary if his impotent claims based on state-created rights to the use of water could be declared his private monopoly under the spurious concept of the *Colorado Doctrine*. He who controls the water in the arid west controls the land.

thereof."[73] The Supreme Court of Utah has correctly stated: "The statutory declaration. . . .*does not vest in the state title or ownership of the water as a proprietor.* It is a community right available to all upon compliance with the law by which that which was once common to all may be brought within the domain of private right to use. . . ."[74] (Emphasis supplied.) The basic proposition declared by Utah's Supreme Court, that the states in the exercise of their police power may control those subject to their jurisdiction in regard to water resources, is commonly accepted.[75]

Pelton does not challenge this proper exercise of the states' police power. *Pelton* nevertheless strikes down Oregon's effort to seize control of lands, rights to the use of water, indeed the water itself, flowing across lands which Congress has set aside for purposes beyond the reach of state law. A rule different from that enunciated in *Pelton* would leave the property of the United States "completely at the mercy of state legislation."[76]

To summarize *Pelton's* effect on the *Colorado Doctrine:*

(a) It obliterates the key concept of the *Colorado Doctrine,* that since the *corpus* of the *water* is *publici juris,* the states have exclusive control over all waters within their boundaries, and that the national government is thus relegated to the status of a private citizen;

(b) It rejects a major premise of the *Colorado Doctrine,* that there can be no right to the use of water on the public domain, including public lands, absent the diversion and use of water. The logical result of this fallacy of the *Colorado Doctrine* would be a reversal of the *Winters Doctrine,* recently applied by the Supreme Court as guaranteeing rights on the reserved lands of the national government not only for present but for future uses of water;[77]

(c) It affirms the supremacy of the national government in regard to "water" and reserved rights to the use thereof;

(d) It leaves a *Colorado Doctrine* which permits the states to choose the riparian or appropriative principles which will govern the private water users. This is the only facet of the *Colorado Doctrine* left intact.

[73] UTAH CODE ANN. 73-1-1 (1953).
[74] Wrathall v. Johnson, 86 Utah 50, 40 P.2d 755, 777 (1935).
[75] Eden Irr. Co. v. District Court of Wever County, 61 Utah 103, 211 Pac. 957, 961 (1922); Vineyard Land & Stock Co. v. District Court, 42 Nev. 1, 171 Pac. 166, 173-74 (1918); Pacific Live Stock Co. v. Lewis, 241 U.S. 440 (1916); Pitt v. Scrugham, 44 Nev. 418, 195 Pac. 1101 (1921); *In re* Willow Creek, 74 Ore. 592, 144 Pac. 507; 146 Pac. 475 (1915); Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258, 260 (1900); Enterprise Irr. Dist. v. Tri-State Land Co., 92 Neb. 121, 138 N.W. 171, 179 (1912); Farmers Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 Pac. 444, 449 (1896); Farmer's High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 134, 21 Pac. 1028, 1031 (1889); California Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555, 562, 567 (9th Cir. 1934) affirmed 295 U.S. 142 (1935). See 3 KINNEY, *op. cit. supra* note 32, at 2428.
[76] Camfield v. United States, 167 U.S. 518, 526 (1897).
[77] Arizona v. California, 373 U.S. 546, 600 (1963).

ATTACKS ON PELTON DECISION HAVE BEEN BASED UPON UNRELATED CASES

Contemporary legal writings frequently argue that *Pelton* is an offshoot of the ripirian doctrine;[78] and that it is destructive of private rights and state sovereignty.[79] The principal decisions relied upon to support these arguments will be analyzed in the succeeding paragraphs.

Hawthorne

On repeated occasions those who attack the *Pelton* decision have relied upon the *Hawthorne* case.[80] Yet a cursory review of that decision reveals that it is not related to the precepts of *Pelton*. Few cases have had a more innocuous beginning, or a more inglorious ending than *Hawthorne*. Naval personnel filed applications with the State Engineer of Nevada for authority to drill wells to provide small quantities of water for domestic use on the Hawthorne Naval Ammunition Depot, which Nevada had ceded to the United States. These wells did not interfere with any vested rights.[81] A filing fee of $6.00 was charged by Nevada. Navy Headquarters disapproved this expenditure because the Navy need not and probably could not comply with the Nevada police regulations.[82] The *Pelton* decision at the time had not yet been reported.

Nevada was apparently anxious to utilize the then recently enacted legislation which would allow the United States to be joined as a defendant in certain suits for the adjudication of water rights. The Attorney General of Nevada was a leading spokesman for state's rights in the field of water law. He had vigorously supported the waiver of the national government's immunity from suit in general adjudication proceedings respecting rights of that nature.[83] However, Nevada's complaint and the action which it initiated in the state court to force compliance with Nevada's law was wholly foreign to the express objective of the above statute.

The action was removed to the federal district court; a brief supporting the position of the United States was filed and that brief was substantially adopted by presiding Judge Ross. The state appealed from an adverse ruling. Nevada's Judge Merrill, speaking for the Ninth Circuit Court of Appeals, directed that the case be dismissed because the district

[78] *Federal Water Rights Legislation, supra* note 16, at 752; Munro, *supra* note 18.

[79] Corker, *Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957*, 45 CALIF. L. REV. 604 (1957); Goldberg, *Interposition—Wild West Style*, 17 STAN. L. REV. 1 (1964); Note, *Western Water and The Reservation Theory—The Need for a "Water Rights Settlement Act"*, 26 MONT. L. REV. 199 (1965).

[80] Nevada v. United States, 165 F. Supp. 600 (D. Nev. 1958); dismissed for want of jurisdiction, 279 F.2d 699 (9th Cir. 1960). (Hereafter referred to as *Hawthorne*.)

[81] *Id.* at 603.

[82] Arizona v. California, 283 U.S. 423 (1931); Hunt v. United States, 278 U.S. 96 (1928).

[83] 43 U.S.C. 666 (1965): waiver of the immunity of the United States from suit in general adjudication proceedings for the purpose of decreeing rights to the use of water of a river system or other source of water. See Hearings before Subcommittee of the Senate Committee on the Judiciary, S. 18, 82d Cong. p. 44.

court was without jurisdiction.[84] *Hawthorne* does not even have the stature of *obiter dictum* and is meaningless in regard to the *Pelton* principles.

Ahtanum

Extended comment has been directed to the *Ahtanum decision*[85] in regard to "federalism" and "riparianism."[86] There are sharp differences on these matters between the opinion of the district court and that of the court of appeals reversing it.[87] The district court and the appellate court in the *Ahtanum* case differed primarily on one basic principle: title and the source of the title to the rights the use of water involved in the litigation. This statement by the court of appeals is indicative of that fact: "Before the treaty [of 1855] the Indians had the right to the use not only of Ahtanum Creek but of all other streams in a vast area. The Indians did not surrender any part of their rights to the use of Ahtanum Creek regardless of whether the Creek became the boundary or whether it flowed entirely within the reservation."[88]

[84] *Nevada v. United States, supra* note 80.

[85] United States v. Ahtanum Irr. District, 124 F. Supp. 818 (E.D. Wash. 1954).

[86] Corker, *supra* note 79, at 626; Munro, *supra* note 18, at 246;

Federalism: Failure to analyze the nature of rights to the use of water and to view them as interests in real property has given rise to charges that *Winters, Pelton* and related cases are predicated upon what has been termed federalism. Yet basically and fundamentally the decisions turn upon sound principles of constitutional law. Critics of *Pelton* and the principles it upholds seemingly ignore the Supremacy Clause of the Constitution.

Riparianism: Winters Doctrine Rights, as reviewed above, are not in any sense riparian in character. Veeder, *supra* note 2, at 161. Certainly the non-Indian successors in interest of *Winters Doctrine Rights* are not exercising riparian rights. Moreover, there is no basis whatever for stating that the rights licensed by the United States for the *Pelton* project are riparian. The very fact of impoundment of large quantities of water does violence to riparian principles which do not countenance cyclic storage. (Seneca Consolidated Gold Mines Co. v. Great Western Power Co., 209 Cal. 206; 287 Pac. 93 (1930).) There has never been any attempt to force the riparian or any other doctrine upon the states.

[87] United States v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1956), *cert. denied* 352 U.S. 988 (1957).

Judge Fee, who rendered the district court decision, had presided at the trial of the *California Oregon Power Company* case (*supra* note 7). His decision is not reported, but differs from the decision of the Court of Appeals for the Ninth Circuit and the Supreme Court, both of which sustained the ultimate disposition which he made of it. Judge Fee's views may be summarized in this sentence from Justice Douglas's lone dissent in *Pelton*: "I would not suppose the United States could erect a dam on this nonnavigable river without obtaining its water rights in accordance with state law." (349 U.S. 435, 452.)

Judge Pope who wrote the *Ahtanum* decision for the court of Appeals [236 F.2d 321 (1956); 330 F.2d 397 (1964); 338 F.2d 307 (1964)] had a broad background in regard to Indian rights to the use of water as counsel for the Flathead Irrigation District, on the Flathead Indian Reservation. See United States v. McIntyre, 101 F.2d 650 (9th Cir. 1939).

The refusal of Judge Fee to recognize that *Winters Doctrine Rights* are different from riparian and appropriative rights, points to one of the basic reasons for disputes in regard to *Pelton.* It was argued by the United States to the trial court that *Winters Doctrine Rights* are neither riparian nor appropriative in character. Rather, it was urged the title to the rights to the use of water in Ahtanum Creek, retained by the Yakima Indians in their Treaty of 1855 is free from the limitations imposed by state statutes or the common law. For the difference between *Winters Doctrine Rights,* riparian rights and appropriative rights see Veeder, *supra* note 2, at 160 *et seq.*

[88] United States v. Ahtanum Irrigation District, 236 F.2d 321, 326-27 (1956).

Pelton and *Ahtanum* have this in common: In both cases the courts which were reversed departed from sound legal principles and rendered opinions based upon the concepts of the *Colorado Doctrine*. These lower courts expressed precisely the same rationale. Judge Fee, writing for the district court in *Ahtanum*, ruled against the United States because "the claims of the United States impinge upon the sovereignty of the State of Washington."[89] Judge Stephens, for the Court of Appeals in *Pelton*, declared: "Oregon has the right to regulate its own water in its own chosen way."[90] *Pelton* was relied upon to dispose of the lower court's decision in the *Ahtanum* case: "Rights reserved by treaties such as this are not subject to appropriation under state law, nor has the state power to dispose of them."[91]

Fallbrook

Citing Fallbrook[92] for authority, this statement has been made under the heading of "The 'public lands' question in the appropriation states": "In jurisdictions following the riparian doctrine, the United States generally possesses a water right no greater than those of other riparian owners and as such does not limit private uses."[93] The statement is based upon a misconception. The issues involved in *Fallbrook* do not relate to "public lands." Rather, those issues pertain exclusively to riparian rights, condemned by the United States for a naval enclave. Obviously the United States can claim no greater riparian rights than those owned by its private predecessor in interest.[94] Under no circumstances should *Winters Doctrine Rights* be confused with riparian rights, the title to which has been purchased from a private owner by the national government. Even though the *Fallbrook Public v. Utility District* did not contest the Federal *Winters Doctrine Rights*, nevertheless, the judgment entered May 8, 1963, in the second *Fallbrook* trial decreed *Winters Doctrine Rights* to the Indian reservations, national forests and national grazing districts situated in the Santa Margarita River watershed above the naval enclave. Those rights, it is to be noted, were adjudicated for any beneficial use.

Fallbrook has likewise been cited in connection with an assertion that the United States has complied with state law for the purpose of acquiring

[89]124 F. Supp. 818, 824 (1952).

[90]*Supra* note 3, at 354.

[91]236 F.2d 321, 328 (1956).

[92]United States v. Fallbrook Public Utility District, 101 F. Supp. 298 (S.D. Cal. 1951); 108 F. Supp. 72 (1952); 109 F. Supp. 28 (1952); 110 F. Supp. 767 (1953); 202 F.2d 942 (9th Cir. 1953); 165 F. Supp. 806 (1958); 193 F. Supp. 342 (1961); Reversed in part and affirmed in part, 347 F.2d 48 (9th Cir. 1965). This case is the subject of a broad review, now in preparation, from the standpoint of political, economic, and legal inquiry, not involved in the present consideration. Noteworthy is the fact, however, that on May 8, 1963, a final judgment was entered decreeing, in effect, every right and interest of Fallbrook Public Utility District subject and subordinate to the prior rights of the United States.

[93]*Federal Water Rights Legislation, supra* note 16, at 758.

[94]United States v. Gerlach Live Stock Co., 339 U.S. 725 (1949).

rights to the use of water.[95] However, the United States was making no claim—in regard to the rights then under discussion by the court—which involved "public land" or *Winters Doctrine Rights.* Rather, the rights involved had been condemned from a private corporation.[96]

City and County of Denver Litigation

The *City and County of Denver* case[97] is a frequently cited basis for attack upon the *Pelton* decision. In the *Denver* case the Supreme Court of Colorado relied heavily upon the precepts of the *Colorado Doctrine* in what appears to be a ruling against the position of the United States. Like *Hawthorne,* however, the facts involved are so far removed from those of *Pelton* that it is clearly incorrect to mention *Denver* in any discussion of the federal-state conflict.[98] Briefly the facts are these: Because the immunity of the federal government from suit deprived the local court of jurisdiction, the United States which had originally filed in the state court, withdrew its pleadings from that court and initiated a new action in the federal court. An appeal was nevertheless taken to the Supreme Court of Colorado by Denver, purportedly against the United States.

This anomaly then developed: Denver served the United States and attempted to join it in the appeal. A motion to dismiss the appeal as to the national government was granted, and Denver lost on the issues before the Colorado Supreme Court. Nevertheless, that court rendered an opinion attempting to enforce the substance of the *Colorado Doctrine* against the United States even though it was not a party to he case.[99] Ultimately Denver conceded the better rights of the national government and the matter was concluded by a decree entered several months after the *Pelton* decision.[100] Thus, like *Howthorne,* the decision of Colorado's Supreme Court in the *City and County of Denver* is *obiter dictum.*

Pelton As It Relates to the "Reservation Theory"

The "Reservation theory"[101] is based upon several misconceptions. As the term has been used it fails to take cognizance of the fact that the title exercised by the Indians in *Winters* and *Ahtanum* never resided in

[95]*Western Water and the Reservation Theory—The Need for a Water Rights Settlement Act, supra* note 79, at 214-15.

[96]The matter of compliance by the national government with state law for the acquisition of water rights is beyond the scope of this consideration. The issue does, however, raise many questions. For example: any right acquired under California law (See CAL. WATER CODE §§ 1629-1631) is subject to being condemned by a public authority after twenty years. If the United States complied with California law—assuming it could, which is denied—could the national purpose be frustrated by such a law? Efforts to force compliance by the United States with the laws of a quasi-sovereign must first overcome fundamental constitutional barriers.

[97]City and County of Denver v. Northern Colorado Con. Dist., 130 Colo. 375, 276 P.2d 992 (1954).

[98]See irrelevant discussion of the *Pelton* principles in connection with *Denver,* Munro, *supra* note 18, at 248-49.

[99]*City and County of Denver v. Northern Colorado Con. Dist., supra* note 97.

[100]Final decree, United States v. City and County of Denver, October 12, 1955.

the national government. Those rights were retained by the Indians and have been appropriately referred to as "immemorial rights."[102] Thus, they were not "reserved" by the United States and were never subject to the Acts of 1866, 1870, or the Desert Land Act of 1877.[103]

A wholly different factual situation prevails in regard to the rights involved in the *Walker River* decision[104] and in *Arizona v. California.*[105] In the strict sense of the word those rights were not "reserved." Rather, upon withdrawal they simply were no longer available for private acquisition. Because of the broad power of the national government over its property, those rights can be used by it for any purpose now and in the future and their use is not limited to the purpose for which they were withdrawn. *Pelton* provides clear authority for that proposition.

CONCLUSION

Pelton's prime importance may be summarized in these terms: It applied the constitutional safeguards, adhered to in all other areas of federal-state relations, to the field of water conservation and utilization, and protects *Winters Doctrine Rights.* The need to preserve the principles declared by *Pelton* is manifest to anyone acquainted with the present plans and problems of Western United States. Repeated efforts to legislate the *Pelton* decision out of existence have failed primarily because of the grave damage to the country which would follow such an abrogation.[106]

[101] *Federal Water Rights Legislation, supra* note 16, at 753.

[102] United States v. Gila Valley Irrigation Dist., D. Ariz., unreported; generally referred to as Globe Equity No. 59.

[103] *Supra* notes 6 and 34; Jennison v. Kirk, 98 U.S. 453 (1878).

[104] 104 F.2d 334 (9th Cir. 1939).

[105] 373 U.S. 546, 600 (1963).

[106] *Need For An Inventory*—Nevada's late Senator Pat McCarran many years ago recognized that the United States must determine the need and availability of water upon its public and reserved lands and the measure of those rights. Accordingly he proposed legislation authorizing an inventory of those rights. Though the provision in question did not become law, the need for it continues today as the attacks upon the *Pelton* decision continue. S. 18, 82nd Congress, Report No. 755, September 17, 1951, Sections 2 and 3.

MONTANA LAW REVIEW

Member, National Conference of Law Reviews

Volume 27 Fall, 1965 Number 1

Published semi-annually, Spring and Fall, by students of the School of Law, University of Montana, Missoula, Montana